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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 515

ROBERT S. BERSON and OSCAR BENNES, et al.,
Petitioners,

vs.

GRAVERAET Y. KAUFMAN, THE FIRST NATIONAL BANK OF CHICAGO, as Trustee under the Will of Otto Young, Deceased, et al.,
Respondents.

See inside caption for full names of both Petitioners and Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1959

No.

OSCAR BENNES, ROSE BENNES, ROBERT S. BERSON, ROBERT S. BERSON, TRUSTEE, MARION G. BEUERLE, FREDERICK C. BEUERLE, JR., EDMUND W. BOKAT, MAX BLUM, NAOMI BLUMENTHAL, ETHEL F. BRODY, HERMAN BRODY, OSCAR BROWN, HAROLD COHEN, IDA COHEN, FREDERICK CONN, NATHAN CURZON, SOPHYE B. DAVIS, NEKTAR DeFLONDER, STANLEY M. FEUERSTEIN, STANLEY M. FEUERSTEIN and ETHEL F. BRODY, Executors of the Estate of Herman M. Feuerstein, Deceased (sued herein as Herman Feuerstein and Herman M. Feuerstein), BERNICE P. FINKELSON, DAVID HENRY FROMKIN, GOLDEN SLIPPER SQUARE CLUB CAMP, PHYLLIS C. HOFFMAN (sued herein as Phyllis Hoffman), ELIOT HYMAN, FREDERICK K. HYMAN (sued herein as Frederick Hyman), KENNETH HYMAN, NORMAN JAY, ROSE JAY, JESSE KAGLE, SAMUEL KAGLE, SAMUEL KAY, ROSE KLEINMAN, MANFRED LEWANDOWSKI, NELLY LEWANDOWSKI, DORA LOBEL and GERTRUDE BRODY, Trustees for Lobel & Brody, a partnership, IRVING W. LOBEL, DORA LOBEL, LUCILLE LUBIN, MILDRED MITCHELL, BELLE MORDELL, HELENE NATHANSON, ARTHUR N. PIERSON, JR., JACK J. RADER, DAVID REVSIN, PHILIP S. ROSEN, SYDELL SCHECTMAN PIZZETTE (sued herein as Sydell Schectman), MILTON SEAMAN, DAVID B. STILLMAN, LILLIAN N. TANKIN and IRVING L. TANKIN, Trustees for Stuart David Tankin, BELLE ZAVOD, CAROLYN SCHNURER and HENRY LEGUM,

Petitioners,

vs.

GRAVERAET YOUNG KAUFMAN, JANE KAUFMAN HARDING, MARIE LOUISE BRILL, JULIET GRAVERAET KAUFMAN DeMANIO, THE FIRST NATIONAL BANK OF CHICAGO, as Trustee, KARL C. JACOBS, SYLVIA KLEINMAN, Executrix of the Estate of Bernard Kleinman, Deceased, MARTIN M. WAGNER, trustee of certain trusts created by agreement, April 15, 1954, for benefit of Adele Joan Wagner, Raymond Irwin Wagner, Douglas Allan Wagner and Warren James Wagner, LOUIS GOTKIN, JACK STEINBERG, ANNA RHINE, HELEN CAPLAIN, PEARL BOOKIN, MARCIA MITTENTHAL, JACK FISHMAN, JOSEPH FISHMAN, SELMA LASHINE, EMANUEL GELBERG, STANLEY EASTON, ARTHUR SIEGEL, STELLA ETKIN, ARTHUR A. EYTEL, ALEX COHEN, ABRAHAM SILBERMAN, ROSE E. KREIS, Executor of the Estate of Maurice Kreis, Deceased, HENRY FRANKEL, HARRY L. LEWIS, FERD. NEWMAN, FRED NEWMAN, HERMAN ROSENBERG, GERTRUDE LESSEM, HYMAN COHEN, DONALD B. JONES, MARTIN M. WAGNER, ETHEL SIEGEL, RALPH BADER, FREDERICK PHILLIPS, BARBARA ANN PLOTKIN, MORRIS LINN, ROSE LINN, JACK SCHARF, MARTIN SCHARF, PEARL GRUBER, MARTIN A. GRUBER, ABRAHAM DOLLINGER, ISIDORE DOLLINGER, H. GORDON ABRAMS, CHARLOTTE HERDER, JOHN SWARTZ and ALBERT J. LEVIN t a Allied Trading Co., a copartnership, MATTHEW J. KREISBERG, HENRY N. RAPAPORT, REBECCA RUBNER and THE CHEMICAL CORN EXCHANGE BANK as Executors under the Last Will and Testament of Gustave Rubner, Deceased, DR. LOUIS RUTTENBERG, CHARLES H. PENNEYS, Trustee for Gail E. Penneys, SAMUEL R. PENNEYS, Trustee for Jane Lee Penneys, SAMUEL R. PENNEYS, Trustee for Neil S. Penneys, and CHARLES H. PENNEYS, Trustee for Richard R. Penneys, PRESTIGE, INCORPORATED, HARRY EPSTEIN, UNITED JEWISH APPEAL OF GREATER NEW YORK, ETHEL PINCUS and IRWIN PINCUS, Executors of the Estate of Jacob M. Pincus, Deceased, ETHEL PINCUS, LEONARD P. LEVY, HAROLD T. SCHNURER, M. ROBERT FROMKIN, MARGARET DeKORWIN and SIMEON WOLFMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Robert S. Berson and Oscar Bennes, *et al.*, respectfully pray this Court's writ of certiorari to review and reverse the decision of the United States Court of Appeals for the Seventh Circuit in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in this case is reported as *Margaret DeKorwin, etc., Plaintiff* v. *The First National Bank of Chicago, etc., et al., Defendants*, 267 Fed. (2d) 337. It is reprinted in full as Appendix I to this Petition.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The opinion of the Court of Appeals was filed and its judgment was rendered on March 30, 1959, and a Petition for Rehearing was filed by petitioners, which was denied on June 10, 1959. This Court has entered an order on August 18, 1959, extending the time for the filing of this Petition for Certiorari to November 6, 1959.

This Court's jurisdiction is invoked under Section 1254(1) of the U. S. Judicial Code (U.S.C.A. Tit. 28, Sec. 1254(1)), which confers upon this Court jurisdiction to review decisions of the United States Courts of Appeals.

THE QUESTIONS PRESENTED FOR REVIEW.

I.

A beneficiary of a testamentary trust brought an action in the Federal Court in Illinois to construe the trust so as to adjudicate whether he had a beneficial interest and for an accounting and distribution of the trust estate. The District Court had diversity jurisdiction. At the time the suit was filed, the trust had not terminated. The District Court finally adjudicated that the beneficiary (and other beneficiaries similarly situated) held vested remainder interests in the trust estate.

Between the entry of this final judgment in 1951 and the termination of the trust in 1956, four beneficiaries holding vested remainder interests in the trust assigned portions of their remainder shares to petitioners and other third persons. After the trust had terminated in 1956, the Trustee (as a defendant in the original suit) filed four petitions to compel the four vested remaindermen and their respective assignees to litigate their conflicting claims to ownership of the vested remainder shares in the District Court. At the time that the four petitions were filed, there was no diversity of citizenship between most of the conflicting claimants to such ownership, more than seventy of whom were residents and citizens of the State of New York.

Petitioners were among the assignees claiming interests in the vested remainder shares of the four remaindermen. They vigorously disputed in both the District Court and in the Court of Appeals for the Seventh Circuit (a) the jurisdiction of the District Court over them and over the subject matter of the Trustee's four petitions and (b) the venue of the District Court to entertain the four petitions.

The first question for review is whether the District Court had any jurisdiction or venue over the parties and the controversy.

II.

The District Court entered a consent judgment against the interests of the petitioners as assignees of the four vested remainder shares of the Otto Young Trust, to which consent judgment none of the petitioners had ever actually consented.

The second question presented for review is whether petitioners have been deprived of their right to due process of law under the Fifth Amendment by the entry of a consent judgment against their interests, to which consent judgment petitioners never consented.

STATEMENT OF THE CASE.

This case was commenced in the year 1943 by the filing of a complaint by a beneficiary of the trust estate created by the last will of Otto Young, deceased, against The First National Bank of Chicago, as Trustee, and others (also beneficiaries) to construe such trust and to take an accounting and make distribution of the trust estate. The case went three times to the United States Court of Appeals for the Seventh Circuit under the title *DeKorwin* v. *The First National Bank of Chicago*, 156 Fed. (2d) 858; 179 Fed. (2d) 347; and 235 Fed. (2d) 156. Jurisdiction of the court in the original action, which was based on diversity of citizenship, was attacked but upheld by the United States Court of Appeals for the Seventh Circuit in the first of such appeals (*DeKorwin* v. *The First National Bank of Chicago*, 156 Fed. (2d) 858, cert. den. 329 U.S. 795).

After a trial on an amended complaint following the first appeal, the District Court finally held and adjudicated

on December 14, 1951, that each grandchild of Otto Young had a vested 1/18th remainder interest in the trust, subject to the then existing life estates provided in the will (*DeKorwin* v. *The First National Bank of Chicago*, 84 Fed. Supp. 918). On the second appeal, the United States Court of Appeals for the Seventh Circuit affirmed this decree (*DeKorwin* v. *The First National Bank of Chicago*, 179 Fed. (2d) 347, cert. den. 339 U.S. 982).

The third appeal to the United States Court of Appeals for the Seventh Circuit was dismissed, upon the ground that an Illinois attorney had no right to continue to prosecute in an Illinois State court the property rights of his client, after his client had insisted that she did not want him to do so, and in fact had previously consented, through another attorney, to the entry of a judgment in the State court dismissing with prejudice the State court suit, which the attorney was attempting to prosecute ostensibly for his client, but actually for his own benefit (*DeKorwin* v. *The First National Bank of Chicago*, 235 Fed. (2d) 156).

Thus the effect of the prior litigation in this case was to adjudicate and determine finally in 1951 that Graveraet Young Kaufman, Jane Kaufman Harding, Juliet Graveraet Kaufman de Manio, and Marie Louis Brill, each of whom was a grandchild of Otto Young, became vested with a 1/18th share respectively in the remainder of the trust estate administered by The First National Bank of Chicago, as Trustee under his will, subject to the existing life estates.

The last life tenant under the will of Otto Young died five years later on August 17, 1956, at which time the vested remaindermen became entitled to have a partition of the properties comprising the trust estate and to have actual distribution made to them of their respective vested 1/18th remainder shares.

However, between the year 1951, when the litigation determining the respective rights of the remaindermen in the Otto Young trust estate had terminated, and the year 1956, when the trust estate of Otto Young became distributable by reason of the death of the last life tenant, the four grandchildren of Otto Young named above (each of whom is a respondent here) made various partial assignments of their respective shares in the trust estate to third persons (certain of whom are petitioners here). Graveraet Young Kaufman assigned to petitioners (and others) his entire 1/18th remainder share.

In December, 1956, following the termination of the trust, The First National Bank of Chicago, as Trustee of the Otto Young Estate, filed four petitions in this case (Appellants' Appendix, Appeal No. 12395, p. 5). In these four petitions, the Trustee alleged that it had received documents notifying it of the existence of the assignments to third-persons made by each of the four grandchildren; that these assignees had in turn made various sub-assignments to other third persons; that by virtue of these assignments and sub-assignments "an actual controversy" existed between each of the four grandchildren, on the one hand, and their respective assignees and sub-assignees, on the other hand, over the ownership of the respective 1/18th remainder shares of the Otto Young trust estate to which each of said four grandchildren were entitled. The Trustee alleged in its four petitions that it could not make actual distribution of the trust estate "until the [District] Court has declared and determined the rights of all of said persons [both the four grandchildren and their respective assignees and sub-assignees] in and to said [1/18th] shares and until the rights and interests of all of said persons have been adjudicated."

The Trustee prayed in its four petitions that the Court declare and adjudicate the rights of each of the four grandchildren in the Otto Young trust estate, and that the District Court instruct and direct the Trustee as to the distribution or disposition which the Trustee should make of said shares, and for general relief.

At the instance of The First National Bank, as Trustee, an order was entered on April 12, 1957, pursuant to Section 1655 of the United States Judicial Code, for the service of copies of a so-called "bar order" upon each of the respective assignees and sub-assignees outside of the State of Illinois, requiring each of them to appear and plead in this case by June 18, 1957, or suffer default for failure to do so.

At the time the four petitions were filed by The First National Bank, as Trustee, and at the time service was had of said so-called "bar order," none of the four grandchildren, and none of their respective assignees or sub-assignees, was a resident or citizen of the State of Illinois.

This appeal primarily concerns the vested 1/18th remainder share of Graveraet Young Kaufman, one of the four grandchildren, and his assignees and sub-assignees. At the time in question, Kaufman was and still is a resident and citizen of the State of New York, and 69 of Kaufman's assignment and sub-assignees were and still are also residents and citizens of the same State of New York. Various other assignees and sub-assignees were residents of Pennsylvania, Nebraska, Connecticut, New Jersey, South Carolina, and Florida.

On June 17, 1957, the petitioners herein, joined with other assignees and sub-assignees who had been made respondents to the petition of The First National Bank of Chicago, as Trustee, relative to the vested 1/18th remain-

der share of Kaufman in the Otto Young Estate, filed a motion in the District Court challenging its jurisdiction over the subject matter of said petition and over them personally. Similar motions were filed relative to the three other petitions. On October 11, 1957, this motion challenging the jurisdiction was overruled and twenty days were given in which to file responsive pleadings. On October 29, 1957, petitioners (and others) filed their answers by which they again prayed that they be dismissed for want of jurisdiction.

No appealable order was entered in this case adversely affecting petitioners until February 20, 1958, when a final order was entered directing the Trustee to make certain payments to Graveraet Young Kaufman out of funds which these petitioners (and others) contended had been duly and validly assigned to them.

On May 22, 1958, the District Court entered an order confirming a Master's Report dated May 7, 1958 (Appellant's Appendix, Appeal No. 12395, p. 67), approving the account and actions of the Trustee during the period from May 26, 1916 to August 17, 1956, except that it surcharged the Trustee for a large sum of money. It also approved certain sums allowed as costs of administration, and as fees and expenses of the Trustee and its attorneys. In this order, the District Court retained jurisdiction of the four 1/18th vested remainder shares "for the sole purpose of determining the claims and controversies between Graveract, Juliet, Marie and Jane and the parties claiming by, through, or under them as to the ownership of the segregated [1/18th] shares."

Petitioners timely appealed from both the order of February 20, 1958 (Appeal No. 12316), and the order of May 22, 1958 (Appeal No. 12395), to the United States Court of Appeals for the Seventh Circuit. Other appeals were filed

by other parties in interest (Appeals Nos. 12314 and 12315), all of whom were among the assignees or sub-assignees of one or more of the four vested remaindermen; Graveraet, Juliet, Marie, and Jane.

The United States Court of Appeals for the Seventh Circuit heard all of the appeals of all assignees and sub-assignees together and rendered a single opinion and decision on March 30, 1959 (Appendix I below).

In their briefs, the petitioners expressly based their appeal from both the order of February 20, 1958, and the order of May 22, 1958, upon the ground that the District Court lacked both venue and diversity jurisdiction over the issues raised in the four petitions filed by the Trustee seeking to have the District Court declare and adjudicate the rights of the four vested remaindermen, on the one hand, and their respective assignees and sub-assignees, on the other hand, in the four respective 1/18th vested remainder shares in the trust estate of Otto Young.

In their briefs filed in the appeal from the order of May 22, 1958 (Appeal No. 12395), the petitioners also raised the further objection thereto that it was entered solely by *consent* of persons other than the petitioners; that the petitioners had not consented to the order, and therefore it was not a judicial determination of the rights of the petitioners; that under both Illinois and Federal law a *consent* decree is a mere agreement of those particular parties who consent to it under the sanction of the court, and is not a judicial determination of the rights of the parties who did not consent to it, and therefore was not binding upon petitioners; and that the order of May 22, 1958 should be reversed, not only because the District Court was without venue and jurisdiction to enter it, but also because peti-

tioners had been deprived of due process of law by the entry of a *consent* decree depriving them of their property rights, to which decree they had not consented.

The United States Court of Appeals for the Seventh Circuit in its opinion and decision of March 30, 1959, held that the District Court had acquired jurisdiction *in rem* or *quasi in rem* over the trust estate of Otto Young because the District Court had previously *stated* that it had drawn the trust *res* into the custody of the District Court; and that therefore the District Court must and did control the trust estate, with jurisdiction to adjudicate all claims thereto to the exclusion of any court of co-ordinate jurisdiction, in order that distribution could be made to the parties lawfully entitled thereto and the trust terminated.

The Court of Appeals held further that the form of each of the assignments made by Graveract Young Kaufman were such as "clearly" to assign "a portion of the *res* itself," and therefore it would have been futile for the District Court to attempt "to declare and adjudicate the rights of the trustee in this matter without making the assignees parties." The Court of Appeals held that in this situation the District Court was empowered to bring in and get service upon petitioners and other non-residents of the State of Illinois (by a so-called "bar order") under Title 28, U.S.C.A., Sec. 1655, and that "to hold otherwise would place the district court in the impossible position of having to rule on the disposition of the segregated shares of the trust estate while at the same time being precluded from adjudicating the merits of the assignments made against those shares."

As to the order of May 22, 1958, the Court of Appeals held that it was binding upon petitioners (who had *not* consented to it), *first*, upon the ground that it was *not* a consent decree and, *second*, upon the ground that petition-

ers were not injured by the decree. Thirdly, the Court of Appeals held that petitioners had failed to protect their rights in the trial court by failing to file any objections to the Master's Report under Rule 53(e)(2) of the Federal Rules of Civil Procedure, despite the fact that the Master's Report conclusively established that the order of May 22, 1958 was solely a *consent* decree which was entered by the consent of certain of the parties to the litigation other than petitioners.

The Court of Appeals upheld the jurisdiction of the District Court over both the subject matter and the parties. It reversed the order of February 20, 1958 upon the merits, and affirmed the order of May 22, 1958. Petitioners maintain that the Court of Appeals had no jurisdiction to do so.

REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

I.

THE DISTRICT COURT LACKED DIVERSITY JURISDICTION TO ENTERTAIN THE FOUR PETITIONS OF THE TRUSTEE OF THE OTTO YOUNG ESTATE AND TO ENTER ANY ORDERS IN RELATION THERETO.

It will be conceded that at the time the Trustee of the Young Estate filed its four petitions in 1956 after the Trust had terminated, there was no diversity of citizenship between Graveraet Young Kaufman, who was a resident and citizen of New York, on the one hand, and the 69 assignees and sub-assignees of Kaufman's vested remainder interest, who were also residents and citizens of the same State of New York, on the other hand. Also, it will be conceded that the Trustee was not the party originating this entire proceeding in 1943.

In other words, the Trustee's four petitions filed in 1956 sought to compel persons who were residents and citizens of the State of New York to litigate *inter se* in the District Court in Illinois controversies which only arose after the final judgment of December 14, 1951, vesting a 1/18th remainder interest in the Trust, subject to the then existing life estates provided in the will, in each of the four grandchildren: Graveraet, Juliet, Marie, and Jane.

No controversy now exists or has ever existed over the ownership of Kaufman's 1/18th vested remainder interest in the Young Estate between the Trustee, on the one hand, and Kaufman and his assignees and sub-assignees, on the

other hand. The only controversy over the ownership of the Kaufman 1/18th vested remainder shares is between Kaufman, on the one hand, and his assignees and sub-assignees, on the other hand. Since Kaufman and 69 of his assignees and sub-assignees were not residents and citizens of different states, but all were residents and citizens of the same State of New York, the District Court lacked diversity jurisdiction over any controversy between them at the time the Trustee filed its four petitions in 1956.

It necessarily follows, therefore, that if the District Court is to have jurisdiction to entertain the Trustee's four petitions, some ground of jurisdiction must be found other than diversity jurisdiction between the conflicting ownership claimants.

II.

THE DISTRICT COURT LACKED JURISDICTION OVER THE CONTROVERSY BETWEEN GRAVERAET YOUNG KAUFMAN AND HIS ASSIGNEES AND SUB-ASSIGNEES UPON THE THEORY THAT THE DISTRICT COURT HAD RESERVED SUCH JURISDICTION IN ITS FINAL ORDER OF DECEMBER 14, 1951.

The Court of Appeals in its opinion and decision held that the District Court had jurisdiction over the controversy between Graveraet Young Kaufman and his assignees and sub-assignees over the ownership of his vested 1/18th remainder share, because the District Court had purported to reserve such jurisdiction in its final order of December 14, 1951.

It is petitioners' position, *first*, that regardless of what jurisdiction the District Court purported to retain in its final order of December 14, 1951, it could not retain jurisdiction over controversies which had not yet arisen at the time the final order of December 14, 1951 was en-

tered in the District Court, and, *second*, that the District Court could not retain jurisdiction in 1951 over the rights of parties such as the petitioners who were not parties to the litigation at the time the final order of December 14, 1951 was entered.

On the first point, we direct this Court's attention to the language of the District Court in this case in its order of May 19, 1949, reported in *DeKoruin* v. *First National Bank*, 84 Fed. Supp. 918, at pages 924-5.

Although the District Court was there considering the effect of a retention of jurisdiction provision in a prior decree entered in 1922 in the Circuit Court of Cook County, Illinois, the same principle is applicable here. The District Court said (p. 924-5):

> "It must be plain that merely because a court once had jurisdiction over both the parties and the subject matter, it could not retain them for years to come *in order to settle disputes which might arise in the future*. The permissible limits of judicial power can not support a retention of jurisdiction *beyond the settlement of the justifiable issues before the court and the disposition of matters necessarily incident thereto, except to carry its decree or judgment into effect* [citing many Illinois cases]." (Italics added.)

The impact of the foregoing language is that the District Court correctly recognized that the mere retention of jurisdiction by any court, State or Federal, over *issues not before the court at the time the original proceeding was instituted and decided* was improper, and that the only proper retention of jurisdiction, once a judicial determination had been made of the issues originally pleaded, was to carry the final judgment on those original issues into effect.

At the time the final order of December 14, 1951, containing the retention-of-jurisdiction provision was entered,

no issue had yet been raised, or even existed, as to the ownership of the Graveract 1/18th vested remainder share among the present owner-claimants. Every single fact and issue relevant to the ultimate determination of such ownership issues among the present ownership claimants arose by reason of facts occurring long subsequent to December 14, 1951.

In this connection, we cite the case of *Hoffman v. McClelland*, 264 U.S. 552. In that case there was a trust estate in the possession of a trustee (exactly as in the case at bar). In that case, the remainderman under the trust filed a diversity suit in the Federal Court to obtain a construction of a trust (created by will) and a decree establishing his ownership of such remainder (substantially identical to DeKorwin's original claim in the case at bar.) In that case, the Federal Court entered a decree establishing the plaintiff's ownership of the remainder interests (exactly as in the case at bar), and providing that the remainder be retained by the trustee during the lifetime of the remainderman. The decree contained the following reservation-of-jurisdiction clause (p. 566):

> "... and this court hereby retains jurisdiction of this cause to the end that it may, from time to time, as occasion may require, exercise its power of direction and control over said trustee in this respect."

The question before the Supreme Court was whether non-diversity third-party (creditor) claimants against the remainder had the right to present a controversy over their rights, or whether the District Court had no jurisdiction of such third party non-diversity controversy, despite such retention of jurisdiction. The Supreme Court answered this question with a firm negative.

Although conceding that, if the Federal Court had "impounded" the trust property, the District Court would then have had jurisdiction over the third-party claims despite such non-diversity, nevertheless the Supreme Court held that the retention-of-jurisdiction clause was *not* sufficient to give the Federal Court jursdiction of the third-party non-diversity claimants. In other words, the Supreme Court held that in the absence of an actual "impounding" of the trust estate in the District Court (sometimes called ACTUAL *custodia legis*), the District Court did not have jurisdiction over the claims of the non-diversity third parties to determine their claim to ownership of a remainder interest then in controversy.

The holding of the Court of Appeals in its opinion that the District Court, by the entry of the retention-of-jurisdiction clause in the final order of December, 1951, "took over the . . . liquidation and distribution of the trust estate," is therefore plainly wrong. For it must be conceded that the District Court never "impounded" (or took into actual *custodia legis*) the Otto Young trust estate in this case.

However, the Court of Appeals went on to hold that merely because the District Court had previously stated in an earlier opinion (*DeKorwin* v. *First National Bank*, 136 Fed. Supp. 720 (p. 723)) that "the trust *res* long since was drawn into the custody of this court," which language the Court of Appeals had, so it said, inferentially approved in its opinion in the third appeal (*DeKorwin* v. *First National Bank*, 235 Fed. Supp. 156 (p. 157)), it followed that the District Court acquired jurisdiction *in rem* or *quasi in rem* over the trust estate and, therefore, must and did control the trust estate and have jurisdiction to adjudicate all claims to the *res*, citing *Princess Lida* v. *Thompson*, 305 U.S. 456, and other cases.

While it is true that in the *Princess Lida* case this Court said that a District Court may obtain *constructive custodia legis* "where suits are brought to marshal assets, administer trusts or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property," the Supreme Court in its opinion in the *Princess Lida* case went on to qualify this holding as follows (p. 466):

> "The [foregoing] doctrine is necessary to the harmonious cooperation of federal and state tribunals. *While it has no application to a case in a federal court based upon diversity of citizenship, wherein the plaintiff seeks merely an adjudication of his rights or his interests as a basis of his claim against a fund in the possession of a state court, this* [*Princess Lida* case] *is not such a case. No question is presented in the federal court as to the right of any person to participate in the res or as to the quantum of his interest in it.* The contentions are solely as to the administration and restoration of corpus." (Italics added.)

The foregoing is another way of saying that the doctrine of *constructive custodia legis* referred to in the *Princess Lida* opinion applies only where questions "as to administration and restoration of corpus" are involved, but does *not* apply to cases where the controversy is over ownership of a fund which is *not* "impounded" by the District Court and therefore is not in ACTUAL *custodia legis*, which is the situation in the case at bar. Under the express exception in the Supreme Court's language in the *Princess Lida* opinion, the doctrine of *constructive custodia legis* does not apply to the case at bar insofar as the controversy is over the question of ownership of an interest in the Otto Young Trust.

This is made clear by the decision of the Supreme Court in the case of *Mandeville* v. *Canterbury*, 318 U.S. 47.

In that case the plaintiff brought an action in the Federal Court in Illinois to construe a will probated in Illinois, which created trusts in certain lands located in Illinois, Minnesota, and Wisconsin, and to direct the trustee to account and turn over to the plaintiff her share. While the case was pending in the Federal Court in Illinois, the defendant filed suits in Minnesota and Wisconsin to determine rights under the will to the lands in those states. The District Court in Illinois enjoined further prosecution of the Minnesota and Wisconsin cases. On appeal the Court of Appeals for the Seventh Circuit sustained the injunction upon the theory that the Federal Court had acquired jurisdiction to administer the trust under the doctrine of constructive *custodia legis* and, therefore, had exclusive jurisdiction to determine all claims in the trust assets wherever located. However, the Supreme Court granted certiorari and reversed the Court of Appeals, saying (p. 49):

> "Maintenance of the suit in the district court does not require possession of the property by that court or require it to assume supervisory or administrative control of it even through exercise of its control over the trustees, at least until it has been determined that [plaintiff] had some interest in the property, nor has the [District] court undertaken to exercise such control."

Petitioners submit that the decision of the Supreme Court in the *Mandeville* case is clear authority for the proposition that the pendency in the Federal District Court of an action to construe a will and to take the trustee's account and distribute the property does *not* give the District Court exclusive jurisdiction of controversies over the ownership of the trust estate between persons claiming interests therein.

Whether it be said that the trust estate is not "impounded", and therefore is not in ACTUAL *custodia legis* for the purpose of such actions, or whether the situation be described by other terms, the decision makes its clear that jurisdiction of controversies between claimants to ownership of a trust estate does not attach merely because of the filing of an action to construe, account and distribute the trust estate, but suits over such ownership controversies must find some other basis of Federal jurisdiction. Since the cause of action in the *Manderville* case was substantially identical to the cause of action initiating the *DeKorwin* case at bar, it is petitioners' position that the *Manderville* decision is a square holding that the original *DeKorwin* case did *not* give the District Court even *constructive custodia legis* over the Young Estate, under the principle of the *Princess Lida* decision.

Insofar as the Court of Appeals held that the District Court necessarily had "jurisdiction *in rem* or *quasi in rem*," petitioners' position is that the mere presence of a *res* within the territorial jurisdiction of the Federal Court in Illinois does not give *non-diversity* claimants to ownership of the *res* a right to litigate their conflicting claims to such ownership in the Federal Court in Illinois. In other words, petitioners maintain that, even if the original *DeKorwin* case be properly described as an *in rem* or *quasi in rem* action, nevertheless this in no way compels the conclusion that the District Court in Illinois had jurisdiction (or venue) of the supplemental proceedings instituted by the Trustee to compel non-diversity New York claimants to ownerships of the *res* to litigate their controversies in the District Court in Illinois at the instance of the Trustee.

If it be assumed that an Illinois trustee of Illinois real estate is informed that two conflicting claimants, both of

whom reside in New York, each claims against the other to be the sole and exclusive owner of the whole of the Illinois real estate, nevertheless the Illinois trustee would not have the right to file, and the District Court in Illinois would not have jurisdiction to entertain a suit to determine such ownership controversy such non-diversity claimants, even if such a suit might be called an *in rem* or *quasi in rem* proceeding. On the contrary, the conflicting non-diversity ownership claimants would retain the right to choose either the Illinois state court or the New York state court in which to litigate their difference. *The trustee could not make the choice for them.*

In a word, therefore, the mere fact that the Court of Appeals describes the original *DeKorwin* case as an *in rem* or *quasi in rem* proceeding, even if it were one (which petitioners deny), would not necessarily establish the jurisdiction or venue of the District Court in Illinois in the present proceeding.

It is important to repeat that the Trustee of the Otto Young Estate was not the original plaintiff in the *DeKorwin* case, and the Trustee did not file this suit originally against all of the heirs of the Young Estate for the purpose of having the Trustee's accounts approved, or to secure a valid construction of the Otto Young will or an order of ultimate distribution to the parties entitled to the remainder interests thereunder. Actually the Trustee was merely a defendant (not the plaintiff) in the original *DeKorwin* suit. There is no showing in the Court of Appeals opinion to indicate how or why the Trustee *as a mere defendant* was entitled to bring an action by what amounts to a supplemental complaint attempting to compel Kaufman, on the one hand, and petitioners as his assignees and sub-assignees, on the other hand, to litigate between them their respective ownership claims in a court having no diversity

jurisdiction, which controversies arose long after the final decree was entered on December 14, 1951, in the original *DeKoruin* proceeding.

The opinion of the Court of Appeals proceeds upon the erroneous theory that petitioners were somehow compelled to disprove the existence of the jurisdiction of the Federal Court. The law is now and has always been that the burden of establishing Federal Court jurisdiction is on the party seeking to invoke it. The Court of Appeals applies in its opinion the phrase "unrealistic, if not unimaginative" to any supposed contention that the District Court did not have "stewardship" and "judicial control" of the Otto Young trust estate. The Court of Appeals also applies the description of "vein of polemic" to petitioners' contention that only a state court of competent jurisdiction, or some other Federal Court having both diversity jurisdiction and venue, could entertain and adjudicate a controversy as between the ownership claimants to interests in the Otto Young Estate. These obscure phrases really serve only to point up the fact that the Court of Appeals' opinion contains no authority whatever supporting either (a) the retention of jurisdiction of *in futuro* controversies, or (b) jurisdiction of ownership claims to property when invoked only by a non-ownership litigant, or (c) jurisdiction to determine conflicting ownership claims to property which has not been impounded and is therefore not in actual *custodia legis* when invoked by non-diversity claimants in an *in rem* action in the Federal Court.

We conclude that the District Court lacked jurisdiction in this case, despite the retention-of-jurisdiction clause in the final order of December 14, 1951.

III.

THIS IS NOT AN ANCILLARY PROCEEDING, BUT IF IT WERE THE DISTRICT COURT LACKED VENUE OVER IT.

An ancillary suit in equity is one growing out of a prior suit in the same court which is dependent upon and instituted for the purpose of obtaining and enforcing the fruits of a judgment in the former suit. *Local Loan Co.* v. *Hunt*, 292 U.S. 234; *Caspers* v. *Watson*, 132 Fed. (2d) 614.

It is petitioners' position that the final order of December 14, 1951, adjudicated the vested remainder rights of the beneficiaries in the Otto Young Trust, and therefore also adjudicated their right to distribution in accordance with such final order. But no controversy was raised as to actual division and distribution of the Otto Young Trust, or could have been raised, at the time the final order of December 14, 1951 was entered, because the existing life estates which were established under the Otto Young will had not yet expired and only expired five years later in 1956. Therefore, the four petitions of the Trustee were not ancillary suits in equity to enforce the prior judgment of December 14, 1951, but were in the nature of supplemental suits for determination of subsequently arising controversies by reason of facts occurring long after the final order of 1951 had been entered.

But for venue purposes, it would make no difference whether the Trustee's four petitions were ancillary suits or supplemental suits, because it is now well established that venue must be shown with respect to new parties brought in for the first time as defendants in any proceeding, either ancillary or supplemental.

We quote from Cyclopedia of Federal Practice, Vol. 3, Sec. 4.08 (p. 2) entitled "Venue in Ancillary Suits":

> "Venue in ancillary proceedings, in general, follows the venue of the original proceeding in the case of parties to the original suit, *but not with respect to any parties brought in for the first time as defendants in the ancillary proceeding.*" (Italics added.)

In this connection we cite the case of *G. & C. Merriam* v. *Sallfield*, 241 U.S. 22. In that case the allegedly ancillary bill was not brought by a defendant (as in the case at bar), but by the plaintiff in the original action. The significant feature of the case, however, was that by this supposedly ancillary bill a new party was brought into the case. This Court held (pp. 29-30) that "so far as the supplemental bill seeks to bring in . . . a new party and obtain relief against him, it is not, in any proper sense, dependent upon or ancillary to the ancillary suit"; that as against the new party "the supplemental bill is an original, not an ancillary, proceeding."

As was stated in the case of *Lewis* v. *United Airlines Transportation Corp.*, 29 Fed. Supp. 112, in considering the *Merriam* case, the language and reasoning of the *Merriam* opinion "is thus decisive on a question of venue. . . . As to the parties to the original bill, as to whom because they are already before the Court there can be no question of jurisdiction over the person, the bill is ancillary if its subject-matter has the required relation to that of the original bill irrespective of the presence of grounds for federal jurisdiction. But as to parties first brought into the case by the so-called ancillary bill, the ancillary bill, *whatever the relation of its subject matter may be to that of the original action*, is necessarily for purposes of jurisdiction over the persons of the new defendants an 'original action' within the meaning of Section 51 of the

Judicial Code, 28 U.S.C.A. §112 . . . But in the absence of [voluntary intervention], irrespective of the presence of ancillary jurisdiction, *the new parties may make objections to the venue if grounds are available therefor under Section 51 of the Code*" (citing *Venner* v. *Pennsylvania Steel Co.*, 250 Fed. 292 and *Manning* v. *Berdan*, 132 Fed. 382). See also *Hazeltine Corp.* v. *Kirkpatrick*, 165 Fed. (2d) 683, in which certain *lis pendens* transferees of interests in certain patents were held to be entitled to object to the venue of the Federal Court over them when they were brought into the original action by supplemental proceeding.

In the effort to sustain jurisdiction, the Court of Appeals in the case at bar also referred to Title 28 U.S.C.A. §1655 as empowering the District Court to bring in and get service upon the non-diversity assignees and sub-assignees residing in the State of New York. It has never been held that Section 1655 of the Judicial Code affects in the slightest degree the diversity of jurisdiction provisions of the Federal Statutes.

Moreover, Section 1655 is expressly limited by its terms to actions in the District Courts which are instituted by a party in interest "to enforce any lien upon or claim to, or to remove any encumbrances or lien or cloud upon the title to, real or personal property within the district."

It is petitioners' position, therefore, that the only party who can avail himself of the benefits of Section 1655 is a party who claims for himself either title to or a lien upon real or personal property within the territorial jurisdiction of the District Court, and that Section 1655 may not be invoked by a mere trustee or stakeholder, such as the Trustee of the Otto Young Estate, who claims neither title to nor lien upon the beneficial interests in the Otto Young Trust.

It is important to repeat here that if Kaufman, on the one hand, or his assignees of sub assignees, on the other hand, had instituted a supplemental proceeding in the original *DeKoracin* case for the purpose of litigating *inter se* their respective ownerships of Graveraet's 1/18th remainder share, the District Court would not have had any diversity jurisdiction between such claimants insofar as they were all residents and citizens of the same State of New York.

Absent any diversity of citizenship between the present conflicting claimants in the case at bar, none of such conflicting claimants could have shown any diversity jurisdiction merely by the exercise of the powers granted under Section 1655 to bring into the Federal Court in Illinois such non-resident claimants as were citizens of the State of New York and other states.

For the reasons stated, therefore, we do not find any support for the jurisdiction and venue of the Federal Court in this case merely because under Section 1655 of the Judicial Code non resident defendants can be brought into an *in rem* case in which diversity exists, unlike the case at bar.

We submit that there is no venue in the District Court insofar as the present controversy raised by the Trustee's four petitions are concerned, regardless of whether they be deemed to be ancillary or supplemental proceedings.

IV.

THE AUTHORITIES CITED AND THE ARGUMENTS MADE BY THE TRUSTEE AND THE OTHER RESPONDENTS IN THE COURTS BELOW.

Both the Court of Appeals in its opinion and the respondents in their briefs and arguments in the courts below rely upon *Farmers Loan and Trust Co.* v. *Lake Street Elevated Rd.*, 177 U.S. 51; *Central Union Trust*

Co. v. *Anderson County*, 268 U.S. 93; and *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 Fed. (2d) 481.

None of these cases supports either the venue or jurisdiction of the District Court in the case at bar. The *Farmers Loan and Trust Co.* case, and the *Central Union Trust Co.* case involved mortgage foreclosures in which the District Court retained jurisdiction to determine questions relating to title to the property sold under foreclosure decree. In the *Central Union* case, the Supreme Court held that the mortgaged property so sold was "in the custody of the court." It is plain that neither of these cases, therefore, has any applicability to the case at bar.

As for the *Natural Gas Pipeline Co.* case, the Federal Court had original jurisdiction based upon the Natural Gas Act, 15 U.S.C.A., Sec. 717, and therefore no question of diversity jurisdiction or venue was in any way involved. Moreover, in that case the Federal Court impounded and thereby acquired ACTUAL *custodia legis* of the property involved. It is plain that the *Natural Gas* case has no bearing on the instant proceeding.

In addition to the foregoing cases, respondents also cited and relied upon *U. S.* v. *Bank of New York*, 296 U.S. 463; *Franz* v. *Buder*, 11 Fed. (2d) 854, cert. den. 273 U.S. 756; and *Dahlgren* v. *Pierce*, 263 Fed. 841, cert. den. 256 U.S. 692. None of these cases is relevant to the case at bar.

In the *Bank of New York* case, it was held that a state court had taken jurisdiction of the res sufficiently to preclude the adjudication of claims against it in a subsequent action in the Federal Court. In the *Buder* case the suit was brought to quiet title to a remainder interest in a trust fund in the Federal Court, after a state court case to construe the will had terminated without retention of

jurisdiction. The suit was not brought *by* the trustees of the trust fund, but *against* them. This was exactly the situation in the original *DeKorwin* case. Therefore the rule in the *Buder* case supports jurisdiction of the District Court in the original *DeKorwin* proceeding. But there is nothing in the *Buder* case having any applicability to the present supplemental petitions filed by the Trustee of the Otto Young Estate to force non-diversity claimants to litigate their claims which arose long after the original final order of December 14, 1951, was entered.

The same comment is applicable to the *Dahlgren* case. There the beneficiaries of a testamentary trust filed an action based on diversity jurisdiction in the Ohio Federal Court for the appointment of a successor trustee upon the death of the prior trustee. Later, the trustee filed a supplemental petition to determine whether he should continue to pay part of the trust income to one Dahlgren, a resident of New York, as an heir under the will. In this supplemental proceeding other beneficiaries sought to remove Dahlgren's claims as clouds upon their title to the whole estate. The Sixth Circuit Court of Appeals held that a "bar order" under Section 57 of the Judicial Code (now Section 1655) had not been properly served upon him, and reversed and remanded the case for further proceedings. By way of dictum, the Court of Appeals said that the District Court had ample power to bring in Dahlgren under the "bar order" provision of the Code. However, Dahlgren was a direct heir of the testator, not an assignee or sub-assignee of an heir whose rights arose after an original proceeding had come to a final determination and decree. The dictum in the *Dahlgren* case, even if it were valid, would therefore not apply in the case at bar.

We conclude from what is said above that, despite the foregoing cases, the District Court had neither jurisdiction nor venue over the four supplemental petitions filed by the Trustee of the Otto Young Estate, in which it attempted to compel the conflicting ownership claimants to litigate controversies over such ownership which arose between non-diversity claimants long after the final decree of December 14, 1951.

V.

THE DISTRICT COURT HAD NO JURISDICTION TO ENTER THE CONSENT DECREE OF MAY 22, 1958 AGAINST THE PETITIONERS SINCE THEY DID NOT CONSENT THERETO, AND SUCH CONSENT DECREE THEREFORE DEPRIVED PETITIONERS OF THEIR RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT.

The Court of Appeals opinion squarely but erroneously states that the order of May 22, 1958, was not a consent decree, merely because the District Court "ruled" that it "was a judicial determination."

The record on appeal conclusively proves that the order of May 22, 1958, was a consent decree, and was not a judicial determination or decree. The Master's Report upon which the order of May 22, 1958, was entered contained absolutely no evidence whatsoever dealing with the merits of the controversy referred to therein, but merely contained a finding to the effect that a "settlement had been reached" and that a decree "to which all parties have agreed" should be entered in the District Court, this being the very order which the District Court actually did enter on May 22, 1958 (Appellants' Appendix, Appeal No. 12395, pp. 67-71, 90-109).

What is said above disposes of the Court of Appeals' contention that petitioners lost their right to attack the order of May 22, 1958 on the theory that they failed to file objections to the Master's Report as provided by Rule 53(e)(2) of the Federal Rules of Civil Procedure.

Rule 53(e)(2) requires the filing of objections to a Master's Report only insofar as it contains *findings of fact* upon the merits of the controversy which the objector regards as erroneous. Since the Master's Report in the case at bar contains *no findings of fact whatever* dealing with the merits of the controversy, there was therefore no obligation upon petitioners to file any objections or exceptions thereto under Rule 53(e)(2).

Insofar as the Master's Report contained conclusions of law, it is equally well settled that no objections or exceptions thereto are required of the litigants. *Waterman* v. *Banks*, 144 U.S. 349; *Socony Vacuum Oil Co.* v. *Oil City Refiners, Inc.*, 136 Fed. (2d) 470, cert. den. 320 U.S. 798; *Arrow Distilleries* v. *Arrow Distilleries*, 128 Fed. (2d) 841; *In re Plenz*, 111 Fed. (2d) 860. There is therefore no merit to the Court of Appeals' contention that petitioners lost their right to attack the order of May 22, 1958 by failing to file objections or exceptions to the Master's Report.

Strangely enough, the Court of Appeals also erroneously says that the record fails to show how petitioners were "injured" by the order of May 22, 1958. The record shows that petitioners were "injured" by the order of May 22, 1958, in two respects:

In the first place, this order charged "in accordance with the settlement" (to which petitioners were not parties) a total of $49,149.94 on account of fees and expenses to the Graveraet Young Kaufman vested 1/18th remainder

share of the Otto Young Trust, and therefore deprived petitioners of that amount of money insofar as petitioners are assignees and sub-assignees of said Graveraet share which had been assigned *in toto* to petitioners and others.

Moreover, in the second place, the order of May 22, 1958, limited the right of petitioners as assignees and sub-assignees of Graveraet Young Kaufman to recover from the Trustee for its breaches of trust, more than the sum of $100,000 for which it was surcharged under the "settlement" (to which petitioners were not parties) by the order of May 22, 1958. No better proof of harm to petitioners could be imagined than the showing that every dollar of the $49,149.94 taken out of the Graveraet remainder share under the "settlement", and every dollar which petitioners as the assignees and sub-assignees of the Graveraet remainder were prevented from recovering from the Trustee beyond the sum of $100,000 under the "settlement", constituted a direct "injury" to petitioners' ownership rights in said fully-assigned Graveraet Kaufman remainder share.

As indicated above, petitioners expressly maintained in the Court of Appeals that they were deprived of their right to due process of law under the Fifth Amendment to the Federal Constitution, by the entry of the consent order of May 22, 1958 to which they did not consent or agree, under a "settlement" to which petitioners were not parties, and which constituted a substantial "injury" to their ownership rights in the Graveraet Kaufman remainder share of the Otto Young Estate.

CONCLUSION.

Petitioners recognize that the granting of this Petition for Certiorari is discretionary with the Court, and that such writ will not ordinarily be granted merely because of error by the District Court or the Court of Appeals, unless such error controverts fundamental Federal law.

In the case at bar, however, the District Court has taken jurisdiction and venue of a controversy over which it has neither any jurisdiction nor any venue, and has in addition thereto substantially injured petitioners by a consent order to which petitioners have never consented under a "settlement" to which they were not parties.

The Court of Appeals, in sustaining the District Court's jurisdiction and venue, and in affirming the consent judgment, has decided extremely important questions of Federal law in a way in conflict with applicable decisions of this Court.

The violation of Federal law is therefore so plain and undeniable in this case that petitioners submit that this case calls for an exercise of this Court's power of supervision, and that the Court should grant the prayer of the present petition accordingly.

PRAYER FOR THIS COURT'S WRIT OF CERTIORARI.

For reasons apparent from the record and stated in this Petition for Certiorari, petitioners respectfully pray that this Court issue its Writ of Certiorari to review and reverse the judgment of the United States Court of Appeals for the Seventh Circuit in this case, with directions to that Court to reverse the order of May 22, 1958 of the District Court insofar as it affects petitioners' rights, and to direct the District Court to dismiss the four petitions of The First National Bank of Chicago, as Trustee of the Otto Young Estate, for want of both jurisdiction and venue.

Respectfully submitted,

HORACE A. YOUNG,
135 South LaSalle Street,
Chicago 3, Illinois,
Attorney for Petitioners.

APPENDIX I

United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM—JANUARY SESSION 1959

Nos. 12314-12315-12316-12395

MARGARET DEKORWIN, etc.
Plaintiff,

v.

THE FIRST NATIONAL BANK OF CHICAGO, etc., et al.,
Defendants.

THE FIRST NATIONAL BANK OF CHICAGO, as Trustee under the Will of Otto Young, Deceased,
Petitioner-Appellee,

v.

GRAVERAET YOUNG KAUFMAN,
Respondent-Appellee,
and
KARL C. JACOBS, et al.,
Respondents (Appellants in No. 12314)
and
DR. LOUIS RUTTENBERG, et al.,
Respondents (Appellants in No. 12315
and
ROBERT S. BERSON, et al.,
Respondents (Appellants in No. 12316)
and
MARGARET DEKORWIN, etc.,
Plaintiff-Appellee
(No. 12395)

v.

THE FIRST NATIONAL BANK OF CHICAGO, etc., et al.,
Defendants-Appellees
(No. 12395)
APPEAL OF OSCAR BENNES, et al.,
(Appellants in No. 12395)

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

MARCH 30, 1959

Before DUFFY, *Chief Judge*, PARKINSON and KNOCH, *Circuit Judges*.

PARKINSON, *Circuit Judge*. These four appeals have been consolidated in this opinion inasmuch as they emanate from the same proceeding below and, to some extent, do or may affect the interests of all parties. No. 12314 challenges the validity and seeks reversal of a protective order entered on February 20, 1958 pursuant to Rule 30(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. The appellants in No. 12315 have adopted the brief of appellants in No. 12314 and have also adopted the brief of appellants in No. 12316, in which the jurisdiction of the District Court is assailed, and which jurisdictional challenge is carried through in No. 12395, wherein a decree of May 22, 1958 is also placed under attack.

This proceeding has been pending in the District Court since 1943 when a complaint was filed to construe the will of Otto Young, deceased, and praying, *inter alia*, for an accounting and distribution by the trustee. It has been here on appeal involving other issues on three prior occasions, *sub nom. DeKoruin* v. *First National Bank of Chicago*, 1946, 156 F. 2d 858; 1950, 179 F. 2d 347; 1956, 235 F. 2d 156.

Graveraet Y. Kaufman, Jane Kaufman Harding, Juliet Graveraet Kaufman de Manio and Marie Louise Brill, four grandchildren of Otto Young, each became vested with an 1/18 share in the remainder of the trust estate administered by the petitioner, First National Bank of Chicago, as trustee under the will of Otto Young, deceased, and also with an 1/18 share, respectively, of the liquidation trust estate, under the conveyance and liquidation trust agreement of November 14, 1951.

The District Court entered a decree on December 14, 1951 pursuant to and approving a family settlement agreement and the conveyance and liquidation trust agreement of November 14, 1951 wherein its jurisdiction was continued and expressly reserved to administer the trust and, *inter alia*, "to supervise and direct the distribution of the income and principal of the testamentary trust estate of Otto Young, deceased, * * *."

The trust is a large one, a great portion of which consisted of real estate and leaseholds which had to be managed and liquidated. Acting under the orders of the District Court herein this was done and liquidation has been completed.

After the death of the last life tenant on August 17, 1956 distribution was in order. However, prior thereto the four beneficiaries named above made various partial assignments of their respective shares in the trust estate.

On September 14, 1956 the District Court ordered the trustee to create segregated share accounts into which the shares of the four assigning grandchildren were to be made and held subject to the further order and direction of the Court. Subsequently, on October 29, 1956, the District Court ordered the trustee to file a petition listing the names of the persons claiming by way of assignment and to cause all of them to be made parties defendant thereto and, on or before June 18, 1957, to appear or plead to the trustee's petition for instructions as to the distribution of the remaining shares. The assignees live in some seven states. None of them lives in Illinois and the majority of them reside in New York.

On February 20, 1958 the District Court entered an order pursuant to Rule 30(b), Federal Rules of Civil Procedure, 28 U.S.C.A., directing the First National Bank of Chicago, as trustee of the testamentary trust estate of Otto Young,

deceased, to pay to Graveraet Y. Kaufman, one of the assigning grandchildren, from funds that are here claimed by the assignees, $14,500 immediately and $1,250 monthly thereafter for his support.

On May 22, 1958 the District Court entered a decree confirming a Master's Report, dated May 7, 1958, approving the account and actions of the testamentary trustee during the period from May 26, 1916 to August 17, 1956. It approved certain sums allowed as costs of administration for fees and expenses of the trustees and their attorneys. The Court also retained jurisdiction of the segregated shares aforementioned "for the sole purpose of determining the claims and controversies between Graveraet, Juliet, Marie and Jane and the parties claiming by, through or under them as to the ownership of the segregated shares."

The three questions that are now presented to this court are:

1. Whether the District Court has jurisdiction to adjudicate the opposing claims to the segregated shares.
2. Whether the assignees now claiming all or part of the segregated shares are bound by the decree of May 22, 1958.
3. Whether the District Court had authority to enter the protective order of February 20, 1958 under Rule 30(b) of the Federal Rules of Civil Procedure.

As a matter of convenience we will treat all three questions as if raised by all appellants without further distinction for to do otherwise would serve no purpose other than to create needless confusion.

In the matter of the District Court's jurisdiction appellants concede "that any *in rem* claims against property that actually is *in custodia legis* must be presented to the court which has the property in custody" and "recognize

that it is no longer necessary for property to be in the physical possession of an officer of the Court, such as a receiver or a Clerk of the Court, in order to be in effect *in custodia legis.*" However, they contend that an action between a trust beneficiary and the persons to whom he has assigned part or all of his interest therein is an action *in personam* and hence where the assignors are non-residents they can not be compelled to litigate their claims as part of the subject matter of a suit in a federal court against a trustee to construe a trust instrument, take an accounting and make distribution, absent any other basis of federal jurisdiction.

Appellees on the other hand claim that this action is *in rem* or *quasi in rem* and, therefore, where the District Court has jurisdiction over the *res* it necessarily follows that that Court has power to determine all claims to the *res.*

We agree with the appellees. When the District Court entered its decree of December 14, 1951 it took over the supervision and direction of the administration, liquidation and distribution of the trust estate.

By decree entered February 4, 1955 the District Court construed the will as empowering the trustee to sell certain specific property and on July 20, 1955 the sale of the property was approved and confirmed.

On October 13, 1955 the District Court enjoined one of the beneficiaries from further prosecution of a state court partition proceeding involving the trust property. *DeKorwin* v. *First National Bank of Chicago*, D.C. N.D. Ill., 1955, 136 F. Supp. 720. The Court there said in its reported opinion at page 723:

> "As has been seen, the trust *res* long since was drawn into the custody of this court * * *"

We dismissed the appeal, *DeKorwin* v. *First National Bank of Chicago*, 1956, 235 F. 2d 156, and stated at page 157:

"Judge Igoe has supplied a chronicle of the salient events and reached conclusions which we consider unassailable."

Only the most jaundiced reading of both opinions would allow one to believe that this Court was not referring to the District Court's conclusion that the *res* was within its exclusive custody.

It appearing from the record that the District Court has for many years exercised complete and exclusive dominion over this trust property certainly it would be inconceivable to hold that the *res* is not held by the District Court *in custodia legis*.

Thus it necessarily follows that the District Court acquired jurisdiction *in rem* or *quasi in rem*. It must and does control the trust estate and, therefore, has jurisdiction to adjudicate all claims to the *res* to the exclusion of any court of co-ordinate jurisdiction in order that distribution can be made to the parties lawfully entitled thereto and the trust terminated. *Farmers' Loan &c., Co.* v. *Lake St. Rd. Co.*, 1900, 177 U.S. 51, 61; *Central Trust Co.* v. *Anderson County*, 1925, 268 U.S. 93, 96; *Princess Lida* v. *Thompson*, 1939, 305 U.S. 456, 466; *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 7 Cir., 1942, 128 F. 2d 481, 485.

Here the District Court had exclusive control and jurisdiction over the entire corpus of the trust estate, all of which is located within the Northern District of Illinois, and, therefore, the case of *Mandeville* v. *Canterbury*, 1943, 318 U.S. 47, cited by and relied upon by the appellants, is inapposite because there the District Court for Northern Illinois had "not attempted to assume such jurisdiction with respect to an asserted but contested interest in land located in another state", *i.e.* Minnesota and Wisconsin.

Those appellants who struggle to upset the decree by attacking jurisdiction cannot by simply assuming they own

impeccable and invulnerable assignments divest the trustee of moneys under its stewardship or the District Court of its power to control the trustee. To say in substance the District Court does not have these funds under its judicial control is unrealistic, if not unimaginative. But some of the numerous assignees insist they have created new and utterly different legal relations between themselves and the assignors and, therefore, are strangers to all proceedings below.

A brief look at a typical assignment made by Graveraet Y. Kaufman will dispel any doubt as to whether it would be the basis of a claim against the *res* or merely a personal action against Kaufman himself. One such assignment to a Phil S. Rosen reads in part as follows:

> "Sixth: The Assignor hereby irrevocably authorizes, empowers and directs the said First National Bank of Chicago, Illinois, Successor Trustee of the trust or trusts created by the Last Will and Testament of Otto Young, deceased, and its successors and any other person who, or corporation which, may at any time have custody of the trust or trusts so created to pay, convey, transfer and deliver to the Assignee herein, the said sum of One hundred twenty-five thousand ($125,000) dollars, and not to make any payment, conveyance, transfer or distribution to the Assignor until the said sum of One hundred twenty-five thousand ($125,000) dollars shall have been fully paid as aforesaid."

This is clearly an assignment of a portion of the *res* itself and points up the futility of the District Court attempting to declare and adjudicate the rights of the trustee in this matter without making the assignees parties. Undoubtedly, this is a situation of which Congress took recognition and clearly had in mind when it enacted Title 28 U.S.C.A. § 1655 and thereby empowered a district court having jurisdiction of the *res* to bring in and get service upon those claiming any portion of the *res* even if they be non-resi-

dents of the State. To hold otherwise would place the District Court in the impossible position of having to rule on the disposition of the segregated shares of the trust estate while at the same time being precluded from adjudicating the merits of the assignments made against those shares.

This record is utterly devoid of any showing that these are valid assignments or that there is any litigation on the claims pending outside the District Court. Nor have any claims from among the profusion of assignments reached the stage, for example, of judgments. No doubt well aware of this, the jurisdictional attack is moved back further and the argument made that "[t]he protective decree the Trustee seeks before making payment must be entered in a State Court of competent jurisdiction or in some other Federal Court having diversity jurisdiction and venue." We think that vein of polemic contains its own refutation, and concedes the trustee's legitimate need for protection before paying over moneys to any claimant.

The next question for consideration is whether the decree of May 22, 1958 is binding on the four segregated shares and all parties claiming thereunder. We hold that it is.

Basically the assignees fail in three respects when they argue that inasmuch as they did not consent to the decree it is not binding on them. Their first error is that this is not a consent decree. In the second place the record fails to disclose, nor have they in argument before this Court shown, in what manner they are injured. Thirdly, they the assignees, have failed in every way to protect their alleged rights at a time when they could and should have done so.

The District Court ruled on June 5, 1958 that the "[d]ecree entered * * * on May 22, 1958 * * * is a judicial determination." The Court there found that the trustee's

fees were in accordance with the liquidation trust agreement, and that the attorney's fees were fair and reasonable in respect to the services rendered. This being so assignees seek to avoid a fair and equitable levy against the segregated shares on the spurious argument that they did not consent to this decree. The assignees apparently believe that if they italicize the word "consent" often enough in their brief they will convince this Court that their consent is an absolute prerequisite whereas such is simply not the case.

Of even more import is the fact that the assignees have sat by with actual knowledge that hearings were in progress before the Master on a general reference and yet did absolutely nothing. Regardless of who eventually is awarded all or part of the segregated shares they would be bound to pay their fair portion of the administrative costs and expenses of the trust estate. Hence the assignees can not be heard to say that they had no interest in the matter. This is more strongly emphasized by the fact that they vehemently attack the District Court's decree which, among other things, incorporates the Master's Report.

They further compounded their imprudence by failing to file any objections to the Master's Report after it was filed with the District Court on May 7, 1958, although they had due notice. They allowed the period in which to file objections as provided by Rule 53(e)(2) of the Federal Rules of Civil Procedure to elapse. They now contend that inasmuch as this decree merely amounted to an agreement between other parties any objection they might have made would have been unnecessary and superfluous. What we have already said is dispositive of this argument.

We, therefore, hold that the District Court's decree of May 22, 1958 is binding in all respects upon the four segregated shares and all parties claiming any interest therein.

As to the third question raised we fail to see how the order entered for support of Graveraet Y. Kaufman, whose deposition the appellants sought to take in New York, where he resided, can be justified under Rule 30(b) of the Federal Rules of Civil Procedure, or for that matter can be justified in any manner on this record.

Rule 30(b) reads as follows:

> "*Orders for the Protection of Parties and Deponents.* After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression."

Therefore, this order could only be valid if it were necessary to protect Graveraet from annoyance, embarrassment, or oppression.

At the time the District Court entered the order on February 20, 1958 the following colloquy occurred:

> "The Court: I am not passing upon the merits of your claim at all. All I am trying to do is give something to this man to live on while this case is pending.
>
> "Mr. Hamilton Smith: You are not passing on the scope of the assignments?

"The Court: No.

"Mr. Hamilton Smith: This is merely a protective order under Rule 30.

"The Court: That is what he calls it.

"Mr. Hamilton Smith: That is what he calls it, yes.

"The Court: All I am trying to do is to give this man, who has been represented to me as being destitute. • • •

"I just can't understand why during the period of this litigation being pending that these people should be so destitute that they are unable to have the necessities of life. That is all I am doing here, providing something for him while the litigation is pending. I am not passing upon the merits of your claim one way or the other."

Thus the District Court intends to support Graveraet with funds that are claimed *in toto* by his assignees. This so-called "protective order" has in effect adjudicated, to some extent, the rights of the parties to this action prior to a determination on the merits.

While it is true the District Court has some discretion to determine what circumstances will justify the protection of a party or witness under Rule 30(b) the facts here furnish no basis whatsoever for the order in question.

Having held that the District Court has jurisdiction of the subject matter and of the parties and that the May 22, 1958 decree is binding on all the parties hereto, said decree and the June 5, 1958 order denying the motion to modify or amend are affirmed and, for the reason stated, the February 20, 1958 order is reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 515

ROBERT S. BERSON AND OSCAR BENNES, ET AL.,
Petitioners,

vs.

GRAVERAET Y. KAUFMAN, THE FIRST NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER THE WILL OF OTTO YOUNG, DECEASED, ET AL.,
Respondents.

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IN THE

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OCTOBER TERM, 1959.

No. 515

ROBERT S. BERSON AND OSCAR BENNES, ET AL.,
Petitioners.

VS.

GRAVERAET Y. KAUFMAN, THE FIRST NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER THE WILL OF OTTO YOUNG, DECEASED, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Respondents oppose the petition for certiorari on three grounds. *First*, the decision of the court below does not conflict with any decision of any other court of appeals or of this Court. *Second*, the questions of law involved are peculiar to the facts of this case and are not of general importance. *Third*, the decision below is correct and is supportable on numerous alternative grounds.

THE QUESTIONS PRESENTED FOR REVIEW.

Petitioners, claimants under purported assignments and subassignments of dollar portions of a testamentary trust estate, seek review of the jurisdiction of the District Court to adjudicate the validity of their claims and reexamination of the trust accounting decree of May 22, 1958. The Court of Appeals upheld the District Court's jurisdiction and the May 22 decree.

The possible alternative grounds upon which the lower court's decision can be sustained are so numerous that no single issue is likely to be dispositive. Because of the complexity of this case, the following are the basic questions which would arise on review.

1. Was the Court of Appeals correct, on the facts of this case, in reaffirming its previous holding that in addition to its original diversity jurisdiction the District Court long ago acquired jurisdiction *in rem* or *quasi in rem* because of its complete control of the administration, liquidation, and distribution of the trust estate?

2. If the District Court has jurisdiction over the trust *res*, does it have jurisdiction to determine the validity of claims against portions of that *res*?

3. May petitioners obtain review of the District Court's jurisdiction to adjudicate their claims by challenging a decree which neither exercises that jurisdiction nor adjudicates their claims?

4. If there were no personal jurisdiction over petitioners, would they not be bound by the accounting decree of May 22, 1958, either because of the District Court's jurisdiction to enter an accounting decree or because they are privies of parties who are bound?

5. Was the Court of Appeals correct in holding that petitioners had failed to show that the May 22 decree affected their claims against the trust estate in any way?

6. Was the Court of Appeals correct on the facts of this case in affirming the District Court's decision that the accounting decree of May 22, 1958, was a judicial determination and not a consent decree?

7. Was the Court of Appeals correct on the facts of this case in holding that petitioners had abandoned any rights they might have had in connection with the trust accounting by failing to protect such rights when they could and should have done so?

8. Was the Court of Appeals correct on the facts of this case in holding that all the shares of the testamentary trust, including those of which petitioners claim portions, should bear a pro rata part of the fees incurred in this litigation and the trust's administration?

STATEMENT OF THE CASE.

Otto Young died testate November 30, 1906, leaving his estate in trust. The Testamentary Trustee was The First National Bank of Chicago and its corporate predecessor. The corpus of the trust estate became distributable upon the death of Otto Young's last surviving daughter, Mrs. Marie Julia Pratt, on August 17, 1956. The present petition for certiorari grows out of one aspect of the litigation in which the trust estate has been involved for the past sixteen years.

Petitioners' Relation to This Litigation.

Petitioners are 56 out of some 500 persons who claim ownership interests measured in dollar amounts in one or more of four of the eighteen shares in the Otto Young trust estate.* During the life of the trust, and while the

* Since the filing of their petition for certiorari, however, 42 petitioners have settled their claims against the trust estate and therefore have no interest in the petition

litigation of which the present petition is a part was pending, petitioners and others acquired purported dollar interests from four grandchildren of Otto Young by instruments in the form of assignments and subassignments. These instruments were served upon the Trustee. When the trust estate became distributable in 1956 the four grandchildren claimed their shares free of ownership interests of others and demanded that the Trustee distribute to them. Petitioners were brought into the case along with all others claiming portions of the trust estate so that the District Court could adjudicate the validity of the conflicting claims and order proper distribution.

Petitioners resisted being brought into the case and took the opportunity afforded by an order entered February 20, 1958, calling for the payment to a grandchild of funds claimed by petitioners, to carry their jurisdictional attack to the Court of Appeals. Though they took no part in the Trustee's accounting which went forward with their knowledge while they were in the case, petitioners took a second appeal, from the decree entered May 22, 1958, which approved the Trustee's final statement of accounts as accurate and complete, approved a settlement of objections to the Trustee's management of the estate, and assessed fees both for the accounting proceedings and for the administration and distribution of the trust estate. The Court of Appeals decided the two appeals in one opinion. On the first appeal the Court reversed the order of February 20, 1958, for the payment of funds, but affirmed the District Court's jurisdiction to determine the validity of petition-

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and no standing to conduct further proceedings. These petitioners are: Marion G. Beuerle, Frederick C. Beuerle, Jr., Edmund W. Bokat, Frederick Conn, Sophye B. Davis, Phyllis C. Hoffman, Norman Jay, Rose Jay, Manfred Lewandowski, Nelly Lewandowski, Mildred Mitchell and Belle Zavod.

In addition, Henry Legum, who is named as a petitioner was not an appellant below.

ers' claims against the trust estate. On the second appeal the Court held petitioners bound by the accounting decree of May 22, 1958. Petitioners now seek review by this Court of the May 22 decree and also seek to use that decree as the occasion for further review of the District Court's jurisdiction to try their claims. The order of February 20, 1958, having been reversed, is no longer available for that purpose.

The District Court's Jurisdiction Through Control of the Trust Estate.

This litigation was begun in 1943, by Joseph de Korwin (whose heir, Margaret de Korwin, is a respondent here), during the life of the trust. The complaint sought, among other things, a construction of the will of Otto Young, an accounting by the Trustee, the removal of the Trustee and the appointment of a receiver, the division and distribution of the trust estate, and general relief. Jurisdiction, based upon diversity of citizenship, was sustained by the Court of Appeals (156 F. 2d 858), and this Court denied certiorari (329 U. S. 795). The District Court construed the will, held that each grandchild of Otto Young had a remainder interest vested subject to defeasance, held that plaintiff had a vested remainder, declared the trusteeship vacant, appointed receivers, and ordered an accounting. *DeKorwin* v. *The First National Bank of Chicago*, 84 F. Supp. 918 (N. D. Ill., 1949). The determination of the remainder interests in the trust estate was thus made in 1949 and not as petitioners state, by the decree of December 14, 1951. The Court of Appeals affirmed in all respects other than the vacancy of the trusteeship and appointment of receivers, and directed the District Court to proceed in conformity with the views expressed. *DeKorwin* v. *The First National Bank of Chicago*, 179 F. 2d 347 (C. A. 7th, 1949), cert. denied, 339 U. S. 982 (1950).

Issues involving allocation of funds between principal and income, distribution of income, and other matters were raised in the District Court. Other issues involving the supervision, liquidation, and distribution of the trust estate came before the Court, and, on December 14, 1951, the Court entered a decree creating a Conveyance and Liquidation Trust to liquidate the large holdings of real estate and leaseholds in the trust estate in order to make distribution practicable at termination. By that decree the Court also deferred the taking of the Trustee's accounts until the termination of the trust. Pursuant to the Court's orders, the Liquidation Trustees took conveyances of trust properties, and, upon termination of the trust, managed and liquidated them. Because of the issues and problems then before the District Court, the decree of December 14, 1951, provided for exercise by the Court of other broad powers of control and supervision of the trust estate. Apart from the provisions of that decree, however, the District Court was called upon to and did grant other relief calling for control over the trust *res*, as in the supervision and approval of sales of trust property. A statement of many of these facts is contained in *DeKorwin* v. *The First National Bank of Chicago*, 136 F. Supp. 720 (N. D. Ill., 1955). The Court of Appeals' opinion dismissing the appeal from that decision, 235 F. 2d 156 (C. A. 7th, 1956), approved the District Court's conclusion that it had even then acquired such dominion and control over the trust estate as to have jurisdiction *in rem* or *quasi in rem*.

Subsequently, when the time for final distribution of the trust assets had arrived, the District Court was informed of the conflicting claims by petitioners and others to ownership of four of the eighteen shares of the trust estate. The Court ordered that separate accounts be created for the contested shares and that these segregated shares be held and administered by the Trustee subject to the further

orders of the Court. All payments into and out of these segregated shares have been and are made only upon order of the District Court.

On April 12, 1957, the Court issued a bar order under Section 1655 of the Judicial Code requiring petitioners, as well as all other claimants, to appear and plead. Petitioners and other claimants are residents of various states throughout the country. Petitioners appeared on June 17, 1957, to challenge the District Court's jurisdiction to adjudicate their claims. The attack on jurisdiction being denied, petitioners pleaded, claiming ownership of specified dollar amounts of the four segregated shares.

The Accounting Proceedings and the Decree of May 22, 1958.

Pursuant to the District Court's orders the deferred accounting went forward and the Trustee submitted its final accounts covering the period March 26, 1916, to August 17, 1956. Objections to the Trustee's management of the trust estate were filed by persons representing seven of the eighteen shares of the trust estate, including the four shares under which petitioners claim. The objections ranged over a period of forty years and presented a wide variety of questions of trust administration. Questions of surcharging the Trustee and of marshalling trust assets were raised.

The District Court referred the accounting to a Master for hearing and report on June 14, 1957. Petitioners, as noted, above, entered the case on June 17, 1957. The first hearing before the Master was held on July 17, 1957. Extensive discovery went forward, involving study of the Trustee's books and records of account, comprising approximately 26,000 pages, examination of over 60 file drawers of original data and documents, study of 38 audit reports by independent firms of certified public account-

ants, and interviews with numerous persons. Factual investigations and preparation of legal issues continued until March 10, 1958, when formal hearings for the taking of evidence began. These hearings lasted, with adjournments, from March 10, 1958, to April 24, 1958. The Trustee put on witnesses and introduced documentary evidence to prove the completeness and accuracy of its accounts as submitted.

On April 21, 1958, just before the Trustee completed its case on its accounting records, the adult beneficiaries approved a settlement of the objections to the Trustee's management of the trust estate. This settlement provided for the payment of $100,000 into each of the seven shares represented by objectors. Each of the four shares under which petitioners claim received such a payment. The settlement was made subject to approval by the Master and the District Court. It was submitted to and fully discussed with both. The Master found that the Trustee's accounts were complete and accurate; he also found that the settlement of disputes over the Trustee's forty-year management of the trust's business affairs was fair and proper.

The Master filed his report with the Clerk of the District Court on May 7, 1958, and the Clerk on that day mailed notice of the filing to all parties, including petitioners. On May 14, 1958, the Trustee served notice on all parties, including petitioners, that it would move the Court to adopt the Master's report. At the hearing on May 22, 1958, the District Court adopted the Master's report and entered the decree recommended. The Court denied petitioners' attempt to file objections to the report at the May 22 hearing on the ground they came too late. A few days later petitioners moved to modify the decree on the ground that they had not consented to it. The District Court denied the motion on June 5, 1958, holding that the decree was a judicial determination and did not require petitioners' consent. From this order and the decree of May 22, 1958, petitioners appealed.

Petitioners' Non-participation in the Accounting.

Petitioners entered the case on June 17, 1957, three days after the accounting had been referred to the Master. The docket and the record then showed the Trustee's submission of accounts, the objections, and the reference. Petitioners had actual knowledge of the status of the accounting proceedings at least by August 19, 1957, when the Trustee served a brief containing that information upon them. The Trustee served a similar brief on petitioners again on September 20, 1957. The taking of testimony by the Master did not begin for almost seven months after service of the first brief, the hearings were concluded eight months after such service, and the Master's report was filed almost nine months afterward. In all that time petitioners neither filed any objections to the Trustee's accounts or management nor sought to do so. They never examined the Trustee's records which, as they were informed, were open to all parties. They did not attend a single hearing before the Master. They filed no objections to the Master's report as required by FRCP 53(e)(2). With full knowledge, they ignored all proceedings until May 22, 1958, and then they sought to object to the Master's report on the sole ground that it assessed fees against shares they claimed under. Their motion to modify also sought only that relief. Petitioners never objected to the accounting aspects of the decree of May 22, 1958, until they were in the Court of Appeals for the Seventh Circuit.

The Decision Below.

On the foregoing facts, the Court of Appeals for the Seventh Circuit held both that petitioners were properly brought into the proceedings in the District Court to have their claims to part of the trust *res* determined and that petitioners were bound by the decree of May 22, 1958. The Court of Appeals held petitioners bound for three distinct

reasons. *First*, petitioners' only argument that the decree should not bind them was that they did not consent to it, but the Court of Appeals held the decree a judicial determination not requiring petitioners' consent. *Second*, petitioners had not shown that the segregated shares were inadequate to cover their dollar amount claims even after the assessment of fees. Without that showing, the fees assessed would not prevent petitioners' claims, if held valid, from being paid in full, and obviously a second accounting action could not benefit petitioners in any way. *Third*, petitioners had abandoned any rights they might have had to challenge the accounting by consistently refusing every opportunity provided to protect such rights.

Respondents.

The petition omits mention of most of the actual respondents in this case and lists instead numerous persons who are not respondents.

Petitioners' adversaries below and the actual respondents here are the Trustee, the Liquidation Trustees, and all beneficiaries under the will of Otto Young, namely the grandchildren and issue and heirs of deceased grandchildren. These persons, only some of whom petitioners have seen fit to name as respondents, oppose the petition for certiorari and subscribe to this brief.

Petitioners have also included as respondents all the assignees and subassignees claiming under one of the four segregated shares. These persons were appellants with petitioners in one of the appeals below. They do not seek certiorari. It is not known why the petition names them respondents.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISION OF ANY OTHER COURT OF APPEALS OR OF THIS COURT.

The Court of Appeals held that under the facts of this case the District Court has exercised such complete control and dominion over the trust estate, and particularly over the four segregated shares, that it has acquired jurisdiction *in rem* or *quasi in rem*.

Both this Court and various courts of appeals have repeatedly held that a trial court acquires jurisdiction *in rem* or *quasi-in rem* when a suit, originally based on diversity jurisdiction, is brought to marshall assets, to restore amounts expended in improper trust investments, administer trusts, liquidate estates, or for similar relief, where, to give effect to its jurisdiction the Court must control the property. *United States* v. *Bank of New York*, 296 U.S. 463-6(1936); *Princess Lida* v. *Thompson*, 305 U.S. 456 (1939); *Dahlgren* v. *Pierce*, 263 Fed. 841 (C.A. 6th, 1920), appeal dismissed, 256 U.S. 682 (1921), cert. denied, 256 U.S. 692 (1921). Such issues and claims for relief were repeatedly brought before the District Court in this case and, as the Court of Appeals held, the District Court expressly "took over the supervision and direction of the administration, liquidation and distribution of the trust estate." (Pet. App. p. 5.)

The holding in *Mandeville* v. *Canterbury*, 318 U.S. 47 (1943), relied upon by petitioners, does not conflict in any way with *Princess Lida*, *Bank of New York*, or this case.

In *Mandeville* this Court reversed the injunction of an Illinois district court restraining suits in Minnesota and Wisconsin relating to land in those states, on the ground that the jurisdiction of the Illinois district court was *in personam* "so far as it relates to the subject matter of the suits pending in Minnesota and Wisconsin." (318 U.S. at 49.) This was recognition that a court of one jurisdiction cannot affect title to real estate in another jurisdiction except through *in personam* power over the owners. The *Mandeville* opinion, however, also recognized that a district court would acquire jurisdiction *in rem* or *quasi in rem*, and hence exclusive control, over a trust *res* where the district court had decided that plaintiff had an interest in the *res*, had necessarily undertaken to exercise supervisory and administrative control of the *res*, and where the *res*, so far as it included real estate, was within the court's territorial jurisdiction. In *Mandeville*, none of these factors were present and this Court held that the district court's jurisdiction as to the foreign real estate was *in personam*. In the present case, all of these factors are present and the Court of Appeals therefore held, consistently with *Mandeville*, that the District Court has jurisdiction *in rem* or *quasi in rem*.

It is well established by decisions of this Court that a court with jurisdiction *in rem* or *quasi in rem* has ancillary jurisdiction to determine all claims to the ownership of the *res*. *Farmer's Loan and Trust Co.* v. *Lake Street Elevated Railroad Co.*, 177 U.S. 51, 61 (1900); *Central Union Trust Co.* v. *Anderson County*, 268 U.S. 93, 96 (1925); *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 F. 2d 481, 485 (C.A. 7th, 1942); *Dahlgren* v. *Pierce*, 263 Fed. 841, 844-45 (C.A. 6th, 1920), appeal dismissed, 256 U.S. 682 (1921), cert. denied, 256 U.S. 692 (1921). These cases refute petitioners' attempt to confine the entire concept of ancillary jurisdiction to suits brought to enforce prior judgments of the same courts.

Contrary to petitioners' contention, a stakeholder may employ Section 1655 of the Judicial Code to get service upon claimants to a *res* in its hands. *Dahlgren* v. *Pierce*, 263 Fed. 841 (C.A. 6th, 1920), appeal dismissed, 256 U.S. 682 (1921), cert. denied, 256 U.S. 692 (1921); *A/S Kredit Pank* v. *Chase Manhattan Bank*, 155 F. Supp. 30 (S.D.N.Y., 1957); *Brown* v. *Pegram*, 143 Fed. 701 (C.C.E.D. Pa., 1906). Moreover, in this case the assigning grandchildren demanded that they be permitted to employ Section 1655 to bring in the adverse claimants if the Trustee was not ordered to do so. Any objection to the Trustee's use of Section 1655 is therefore not only without foundation in law but is addressed to a technicality which could prejudice no one.

Petitioners' contention that venue is improper ignores the fact that section 1655 is also a venue statute which provides for venue over all claimants to a *res* in the district where the *res* is located. *Greeley* v. *Lowe*, 155 U.S. 58 (1894); *Huntress* v. *Huntress' Estate*, 235 F. 2d 205 (C.A. 7th, 1956); *Graff* v. *Nieberg*, 233 F. 2d 860 (C.A. 7th, 1956).

The decision of the Court of Appeals in this case, therefore, conflicts with no decision of this Court or of any court of appeals, and violates no federal law. Instead the decision below is in full accord with principles repeatedly enunciated by this Court and numerous lower courts.

II.

THE QUESTIONS OF LAW HERE INVOLVED ARE PECULIAR TO THE FACTS OF THIS CASE AND ARE OF NO GENERAL IMPORTANCE.

The complete lack of general significance of this case is illustrated by the threshold issue which would be presented on any review: have petitioners' claims been

impaired in any way by the May 22 decree? A determination of this issue depends entirely upon the particular facts of this case, including: (a) the value of each segregated share; (b) the total amount of claims of assignees and subassignees, including petitioners', against each share; and (c) the priorities as among the various claimants, including petitioners, to each share. The record petitioners have brought to this Court, and which they brought to the Court of Appeals below, does not show the size of any contested share nor the total claims against any share. Moreover, the priority of claims has not been established. Thus, the May 22 decree cannot be shown to have affected petitioners' claims in any way.*

Another preliminary question on review would be whether petitioners, having objected in the District Court to nothing more than the allowance of any fees from the shares they claim under, are able to expand their objections to other aspects of the May 22, 1958, decree at the appellate level.

The other questions presented in the case are of no greater general importance. Petitioners seek to attach due process significance to the fact that the Court of Appeals disagreed with their position. The questions actually involved, however, are far more mundane: *e. g.*, whether, on the facts of this case and the record before the Master and the District Court, the decree of May 22, 1958, was a consent decree or embodied a judicial determination; and whether petitioners' repeated deliberate refusals to take any part in the accounting proceedings before the Master

* The District Court has not yet determined the validity of petitioners' claims to the trust estate. This fact, together with those noted in the text, indicates not only that petitioners have failed to demonstrate prejudice but that the whole proceeding below stands at an intermediate stage and is not ripe for consideration by this Court.

and in the District Court disable them from seeking a second accounting proceeding at this juncture.

The only jurisdictional question in this case is whether the facts show that the issues brought before the District Court and its control and supervision of the trust estate through various orders and decrees are sufficient to bring the case within the rules laid down in numerous decisions. See pp. 11 to 13, *supra*.

III.

THE DECISION OF THE COURT OF APPEALS IS SUPPORTABLE ON SEVERAL ALTERNATIVE VALID GROUNDS.

The Court of Appeals' decision is based on and is supportable on alternative grounds. There is no single question which is dispositive of the issues. For example, since petitioners cannot demonstrate that the May 22 decree will have the effect of preventing any of their claims, if ultimately held valid, from being paid in full, petitioners can point to nothing which adversely affects them. Petitioners thus have no appealable interest which would enable them to question either the District Court's jurisdiction or the merits of the May 22 decree.

Alternatively, review of the accounting decree of May 22, 1958, would not support review of the District Court's jurisdiction to determine petitioners' claims to the trust *res*. The May 22 decree in no way adjudicates petitioners' claims, but merely ends the accounting phase of this litigation. Thus, the only jurisdictional review the decree could support would be a review of the District Court's jurisdiction to take the Trustee's accounts. Petitioners do not and have not challenged that jurisdiction.

Aside from questions of jurisdiction, moreover, the Court of Appeals affirmed the May 22 decree on three alternate grounds set forth in the opinion (Pet. App. p. 8):

Basically the assignees fail in three respects when they argue that inasmuch as they did not consent to the decree it is not binding on them. Their first error is that this is not a consent decree. In the second place the record fails to disclose, nor have they in argument before this Court shown, in what manner they are injured. Thirdly, they the assignees, have failed in every way to protect their alleged rights at a time when they could and should have done so.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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